

06.05.2004, E.2002/70, K.2004/56

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Subject : Equality, Criminal proceedings, Presumption of innocence, Right to counsel, Accused, special protection / Legal aid, without demand.

Headnotes:

Providing an advocate from Bar Associations for the accused or the detained upon their demand, and for vulnerable groups such as speech-impaired, deaf and handicapped persons without their demand is not contrary to the Constitution. The accused is under the threat of penalty and thus in particular need have defence. The principle of presumption of innocence renders the right to have a defence a fundamental requirement in order to arrive at a decision in criminal proceedings. For that reason, the rights of the accused are given priority in national and international documents. This does not impede the legislator from enacting provisions regarding the rights of aggrieved persons, as is the case for the accused and the detained.

Summary:

The Bursa 5th Court of First Instance brought an action before the Constitutional Court alleging that Article 138 of the Code of Criminal Procedures (amended by Law 3842) was contrary to the Constitution.

Under Article 138 of the Code of Criminal Procedures, if the accused or the detained declares that he/she is not in a situation to have an advocate appointed themselves, then an advocate is appointed for him/her from the Bar Association upon the request of the law-enforcement authorities or of the court. If the accused or the detained is under the age of eighteen or he/she is speech-impaired or deaf or handicapped to the degree that he or she is unable to defend himself or herself, then an advocate shall be appointed on behalf of him/her without demand.

The Court that referred the case to the Constitutional Court alleged that the provision of Article 138 of the Code of Criminal Procedures confers more rights upon the defence than upon the aggrieved. The right to have a defence is assured for the accused or for the detained, while the aggrieved party in spite of his/her desire may not have an advocate appointed from the Bar.

Article 10.1 of the Constitution provides that "All individuals are equal without any discrimination before the law, irrespective of language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such considerations."

The Constitutional Court stressed that the protection of the accused or detained person as provided in the article in question, is a special protection for persons who do not have the possibility of having an advocate or for those who are under the age of 18 or deaf or speech-impaired or handicapped. Therefore, this special protection must be taken into account in the constitutional review of the provision in point. The appointment of an advocate for a certain group of people without their demand is made after considering whether a special protection is needed or not for those people. From that point of view, the objected provision reinforces the right to fair trial and the right to defence.

The developments in contemporary criminal law are directed towards protecting the aggrieved party as well as the accused and the detained. Thus, there is no obstacle impeding the legislative power from bringing provisions regarding the rights of aggrieved parties. As a matter of fact, there are some provisions in the recently-drafted Code of Criminal Procedures regarding the rights of aggrieved parties.

Therefore, the demand was rejected. Justice H. Kilic had a dissenting opinion and the justices M. Erten and F. Sađlam had different reasonings.